NOS. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119, & 15-191

In the Supreme Court of the United States

DAVID A. ZUBIK, *et al.*

v.

SYLVIA BURWELL, *et al.*

PRIESTS FOR LIFE, *et al.*

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*

v.

SYLVIA BURWELL, *et al.*

EAST TEXAS BAPTIST UNIVERSITY, *et al.*

v.

SYLVIA BURWELL, *et al.*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED,
DENVER, COLORADO, *et al.*

v.

SYLVIA BURWELL, *et al.*

SOUTHERN NAZARENE UNIVERSITY, *et al.*

v.

SYLVIA BURWELL, *et al.*

GENEVA COLLEGE

v.

SYLVIA BURWELL, *et al.*

**On Writs of Certiorari to the
United States Courts of Appeals
for the Third, Fifth, Tenth, and D.C. Circuits**

SUPPLEMENTAL REPLY BRIEF FOR PETITIONERS

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SUPPLEMENTAL REPLY BRIEF

The government concedes—albeit begrudgingly, and 14 pages into its 20-page supplemental brief—that its existing regulatory scheme "could be modified" to eliminate the self-certification requirement for petitioners with insured plans without sacrificing its professed objective of "ensuring that the affected women receive contraceptive coverage seamlessly." Resp.Supp.Br.14-15. That alone is enough to doom its RFRA defense, as the government *itself* now admits it could achieve its objective—allowing employees and their dependents to receive coverage from the same insurance company and provider network—through less restrictive means. The government nonetheless insists that this Court "should not require any change" to the existing regulatory scheme. Resp.Supp.Br.3. But that is not how RFRA works, and the government's argument rests on several mistaken premises—including its erroneous belief that petitioners would object to *any* scheme in which the same insurance companies with which they contract provide contraceptive coverage to their employees. As petitioners have explained, so long as they are truly exempt from the contraceptive mandate (not just given another means to "comply")—meaning that coverage supplied by third parties is truly separate from petitioners' own plans as described below (not just labeled "separate" by the government)—that would suffice to eliminate petitioners' RFRA objection.

The government does not even attempt to identify any means through which it could eliminate the "self-certification" process for petitioners that use self-insured plans. Instead, it quite remarkably suggests

that every petitioner should be forced to switch to a commercially insured plan. Setting aside the untold costs and disruptions occasioned by such a compelled switch, when the government's only solution to a RFRA problem is to force religious organizations to abandon their *church plans*, something has clearly gone wrong. Moreover, if the government really believes the only way to accomplish its objectives is to force every religious nonprofit to contract for an insured plan so the government will have something suitable to piggyback on, then petitioners' concerns that the government wants to hijack their plans have been confirmed. Petitioners' alternative—where the separate policies offered by commercial insurers are offered to employees of self-insured objectors as well—would reinforce the true separateness of those policies, rather than just reinforcing the RFRA violation. In all events, the government itself now concedes that it has less restrictive means available to it, and so it *must* use them or abandon the mandate as to petitioners entirely. RFRA demands nothing less.

ARGUMENT

I. The Government Has Less Restrictive Means Of Achieving Its Objectives For Petitioners With Insured Plans.

The government's concession that its regulatory scheme "*could* be modified" to eliminate the self-certification requirement for petitioners with insured plans while still "ensuring that the affected women receive contraceptive coverage seamlessly" must await page 14 of its brief because the government first insists that it should not have to make "any change" to its regulatory scheme. Resp.Supp.Br.14-15

(emphasis added). But that is not how RFRA works. When the government *itself* concedes that it can achieve its ends through less restrictive means, then it must do so, and the substantial burden it has imposed on religious exercise cannot be sustained.

The government's complaints are not only legally irrelevant; they are also unpersuasive. The government's latest objection to eliminating the "self-certification" requirement is that it "provides clarity and certainty for all parties affected"—including, oddly, petitioners. Resp.Supp.Br.8. But religious nonprofits do not need to "self-certify" before taking advantage of the Title VII exemption to hire only co-religionists. Nor do churches, integrated auxiliaries, or religious orders that stick to their knitting need to "self-certify" in order for *their* insurance companies to exclude contraceptive coverage. Both exemptions are self-executing. There is thus no real need for any such formal notice in this context either.

The government complains that it undertook "three rounds of notice-and-comment rulemaking" before adopting self-certification and, in its own view, went to "great lengths ... to minimize any burden on religious exercise." Resp.Supp.Br.1.[1] Setting aside the problem that the three agencies charged with rulemaking were poorly equipped to assess or minimize religious burdens (and still appear not to recognize that the whole enterprise should have been shaped by *Congress'* judgment in RFRA), *see* Cato Inst. *Amicus* Br., the government's narrative suffers from a

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[1] In fact, the government skipped notice-and-comment for two of these proceedings. *See* 75 Fed. Reg. 41,726, 41,730 (July 19, 2010); 76 Fed. Reg. 46,621, 46,624 (Aug. 3, 2011).

healthy dose of revisionist history. Each of the comments it attempts to portray as supportive of self-certification began—like countless others comments the government ignored—by reiterating that the *best* way to "minimize any burden on religious exercise" was to exempt *all* religious nonprofits from the mandate.[2] Moreover, these rulemakings included multiple instances in which the government belatedly embraced solutions as workable after telling courts that the then-current system was the least restrictive option. The government initially insisted, for instance, that an EBSA 700 form was indispensable. As it turns out, the government often can accomplish its goals in ways it previously ignored or resisted.

The government protests that "petitioners have never suggested that an arrangement like the one posited in the Court's order would allay their religious objections." Resp.Supp.Br.11-12. Even assuming that were true, *but see, e.g.*, Appellants' Joint Supp. Br.20-21, *Priests for Life v. Health & Human Servs.*, No. 13-5368 (D.C. Cir.); *Zubik* Opening Br.82; Pls.' Joint Supp. Br.8, *Zubik v. Sebelius*, No. 13-cv-01459 (W.D. Pa.), the government has never offered petitioners an option that did not "require any involvement" on their part "beyond their own decision to provide health insurance without contraceptive coverage to their employees." Order 1. And there is a critical difference between what the order envisions (petitioners being free to comply with their faith and purchase insurance that conforms to their religious beliefs) and what the

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[2] *See, e.g.*, Catholic Health Ass'n Comment 2 (Apr. 4, 2013); Wheaton Franciscan Healthcare Comment 2 (Apr. 8, 2013); Ass'n of Jesuit Colls. & Univs. Comment 2 (June 19, 2012).

government has offered (alternative means to comply with the mandate backed by massive penalties). If, by virtue of exercising their religious beliefs in the former scenario, petitioners' choices create a gap in coverage for their employees, the government is free to fill that gap independently of petitioners, whether via the Exchanges, Title X, a contract with one meta-insurer, or through truly independent arrangements with petitioners' commercial insurers. But there is a world of difference between that and a regime in which the government compels petitioners themselves to ensure there is no gap in coverage by taking affirmative steps, on pain of massive penalties, to make contraceptive coverage available. The latter is all petitioners have ever been offered, and it is what they have steadfastly and correctly challenged under RFRA.[3]

At any rate, however the government *thinks* petitioners would have responded to such an offer is irrelevant. Petitioners have made crystal clear that they do *not* object to every regulatory scheme in which the same insurance companies with which they contract provide contraceptive coverage to their employees. If petitioners were *truly* exempt from the mandate, and those companies were to offer their employees the kind of *truly* separate coverage that petitioners have described—*i.e.*, "a separate policy, with a separate enrollment process, a separate insurance card, and a separate payment source, and

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[3] This is the same distinction petitioners have been making throughout this litigation. It is the difference between the government independently drafting someone else after a conscientious objector objects, and the government forcing the objector to provide a substitute.

offered to individuals through a separate communication"—then petitioners would no longer have a RFRA objection. Petr.Supp.Br.1.

While that arrangement would achieve the government's objective, it is materially different from the current system. First and foremost, it would not require petitioners to "comply" with the mandate. They would be exempt, with no threat of massive penalties looming over them as a consequence of their decision to provide a health plan that does not include contraceptive coverage. Insurance companies—and *only* insurance companies—would be obligated to provide that coverage to any employees who want it. None of that can be dismissed as semantics. As noted, there is a world of difference between the government and a willing commercial insurer acting to fill gaps created by petitioners' religious exercise and compelling petitioners to take steps to fill the gaps themselves. In the former situation, the coverage would be provided pursuant to an independent contract between the insurance company and the plan beneficiaries, not as an automatic and unavoidable companion to petitioners' plans. Instead of ostensibly "separate payments" made along with a single plan, moreover, there would be separate coverage under a separate policy with a separate card.[4]

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[4] As explained, Petr.Supp.Br.9-11, any state-law or cost-related concerns regarding such arrangements can be addressed via an opt-in requirement and the existing funding mechanism, or by the government sponsoring a self-insured group plan. Moreover, "to the extent that [state law] prevents the application of a requirement of" the ACA, it is preempted. 42 U.S.C. §300gg-23(a)(1); *see also id.* §18041(d); 45 C.F.R. §§146.143, 148.210.

The absence of that kind of true separation under the current scheme is precisely why petitioners sincerely believe that the acts they are forced to take constitute impermissible facilitation of and complicity in the provision of contraceptive coverage. Unlike the current scheme, the alternatives advanced by petitioners would not force them to cross that line. And it is not for the government or the Court "to say that the line" petitioners have drawn in this regard is "an unreasonable one." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). The only question is whether the substantial burden the government has imposed on religious exercise is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2). As even the government now concedes, it is not.

II. The Government Has Less Restrictive Means Of Achieving Its Objectives For Petitioners With Self-Insured Plans.

As petitioners explained, Petr.Supp.Br.16-20, employees of petitioners with self-insured plans cannot receive contraceptive coverage through the petitioners' own "insurers" without overriding sincere religious beliefs because in that context the insurer itself holds the religious objection. The government acknowledges as much—and even acknowledges that, in the self-insured context, it requires petitioners to play an essential role in the delivery of that coverage by signing a form or notice necessary to change the terms of petitioners' own plans in violation of their religion. Resp.Supp.Br.15-17. This admission directly contradicts the lower courts' holdings that coverage is triggered by federal law alone. *E.g.*, No. 14-1418

Pet.App.33-36. Nonetheless, unlike petitioners, Petr.Supp.Br.20-24, the government offers no proposal under which employees of petitioners with self-insured plans could obtain coverage "in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees." Order 1. Instead, it just blithely asserts that petitioners with self-insured plans can "switch to an insured plan." Resp.Supp.Br.17.

The government's continued inability to recognize that it cannot cure one substantial burden on religious exercise by imposing another is inexplicable. Even the government must realize that petitioners would object to being forced to reorder their insurance arrangements for the sole purpose of making it easier for the government to get contraceptive coverage to their employees. Moreover, dropping self-insured plans would impose real costs—both financial and religious—on petitioners. Just as the government generally may not force people to forgo various other benefits as the price of exercising religion, *see Thomas*, 450 U.S. at 719, nor may it force petitioners to forgo the benefits of self-insured plans. Petitioners use self-insured plans not just for practical reasons, such as reducing costs, but also because doing so allows them to provide health benefits in a manner consistent with *all* their religious beliefs—not just those relating to contraception. *See* JA979-90, 1001-02, 1010, 1193-98, 1204-05, 1210-11. That is true not just of petitioners that use self-insured church plans, but also of petitioners that self-insure without using a church plan, as that is often the only way to avoid the many state-law mandates that violate their religious beliefs,

such as those requiring coverage of surgical abortions. *See, e.g., Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 106 (Cal. 2004) (Brown, J., dissenting). No state has yet suggested that religious organizations must contract with commercial insurers so the state can more easily meet its objectives. It is startling that the federal government does so now. That is far too dramatic an intrusion on religious exercise to be thrown out so casually.

Nor would forcing petitioners to abandon their *church plans* be remotely consistent with *Congress'* evident intent in exempting those plans from ERISA. The whole point of that statutory option is to avoid government entanglement in religion, and allow religious employers to provide health benefits *in a manner consistent with their religious beliefs*. *See, e.g.*, JA525-26. Moreover, the government ignores that petitioners include not just employers, but also two entities—Christian Brothers Employee Benefit Trust and GuideStone Financial Resources—that provide church plans. The government's casual suggestion could cost them as much as $170 million in annual medical plan contributions. *See* JA1007, 1097, 1183.

In all events, the government's extraordinary proposal just confirms that it really does want to hijack petitioners' plans, as the government would force self-insured petitioners either to relinquish control of their plans to be used to provide contraceptive coverage, or to abandon those plans entirely so the government has an insured plan that it may more easily exploit. The government's suggestion for self-insured objectors thus exacerbates the RFRA problem, while petitioners' proposal would ameliorate

the problem by reinforcing the true separateness of the coverage offered to employees of insured objectors by allowing it to be offered to employees of self-insured objectors as well. The government cannot object to that proposal on "seamlessness" grounds, as the existing regulations already permit a TPA to "[a]rrange" for the provision of coverage by a separate "issuer or other entity." 26 C.F.R. §54.9815-2713AT(b)(2). Because the government can achieve the same ultimate end without demanding petitioners' participation, RFRA requires it to do so.

The government concludes by pleading with the Court to resolve this case in a way that lays to rest all future RFRA objections to the mandate. But the existence of less restrictive means brings this litigation to an end. Full stop. It is now the government's job, not petitioners' or the Court's, to fashion a regulatory scheme that complies with RFRA. That said, while petitioners cannot speak for every religious adherent that objects to the mandate, this Court's order points the government to a path that should suffice to eliminate *meritorious* RFRA claims—namely, *truly* exempt all religious nonprofits from any obligation to "comply" with the mandate, and independently obligate, incentivize, or contract with insurance companies to provide *truly* separate coverage to any of petitioners' employees who want it. While petitioners cannot guarantee that no religious adherent would challenge such an arrangement, this Court's order (and subsequent opinion) would surely deter such a challenge. But in all events, what matters for purposes of *this* case is that the government now agrees that it can achieve its objectives through less restrictive means. That alone suffices to defeat its RFRA defense.

Respectfully submitted,

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